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to reject all applications, not on their merits but at his will. This is shown by the directions of the Secretary to the Commissioner of the General Land Office to send instructions to all local land offices to the effect that they are not to receive further applications for permits and to reject all applications then pending (R. 3). Reference is made to paragraph 3 of Circular No. 672 wherein it is stated "The granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior and any application may be granted or denied either in part or in its entirety as *the facts may be deemed to warrant.*" (R. 4) The "facts" were not considered at all because the local land offices were not to "receive" further applications and were to "reject" all applications then pending. The effect of this Order was to arbitrarily reject all applications without regard to the facts. This amounted to a suspension of the Leasing Act. This construction of the Act was not sustained by Justices Van Orsdel of the Court of Appeals of the District of Columbia and Siddons and Bailey of the Supreme Court of the District of Columbia (R. 33-35) and was entirely ignored by Justice Robb in his opinion. The Court of Appeals decided this case upon the theory that the Secretary of the Interior by his Orders suspended the Leasing Act under the Withdrawal Act of June 25, 1910. To determine the purpose of Congress in passing the Act of February 25, 1920, reference may be made to the rulings of the Department prior to March 13, 1920. Section 13 of the Leasing Act provides how *preference* rights may be obtained by erection of monuments on land prior to the granting of the prospecting permit. In Haynes vs. Smith, 50 L. D. 208-211, it is said:

> "It is perhaps needless to state that this Department has no legislative power and must leave to the action of Congress any suggested amendments of the Act of February 25, 1920."

In that case, it was said:

> "The rights of an applicant for a prospecting permit for oil and gas under Section 13 of the Act of February 25, 1920 pass, on the death of the applicant, to his or her personal representatives in the same way as other personal property."

So the "right" to a prospecting permit is recognized by the Department as *property* which will pass on the death of the applicant to his heirs the same as other personal property. As the act itself in Section 13 provides for a *preference* right and as the Department in this and other decisions has held that the *"right"* is "property", it is certain that it cannot be taken away at the mere will or whim of the Secretary of the Interior. In the supporting brief of the petitioner and in the briefs tendered by the Attorneys General of several states, the authorities have been assembled showing that the duty to grant a permit "as the facts may be deemed to warrant" is mandatory on the Secretary of the Interior and not permissive only. Under these circumstances, this brief will discuss only the question as to whether the act of the Secretary in his Orders amounted to withdrawal of all public lands under the Act of June 25, 1910. (See also 48 Land Decisions 98,—Instructions by Secretary of Interior quoted in petition for writ of certiorari, page 14.)

Did Orders Nos. 337 and 338 of the Secretary of the Interior Constitute a Withdrawal under the Act of June 25, 1910?

The opinion of the Court of Appeals of the District of Columbia is based upon the propbsition that the action of the Secretary of the Interior in making Orders Nos. 337 and 338 in March, 1929, amounted to a withdrawal under the Act of June 25, 1910. The question at once arises "Did the Department treat these Orders as a withdrawal under that Act?" While the decision of the Department is not conclusive on this court, yet it is very persuasive and may be taken into consideration in determining whether there was such withdrawal. In the Congressional Record of January 15, 1931, beginning at page 2325 are printed the reports of the Secretary of the Interior to Congress, under the Act of June 25, 1910, for three years, the year prior to 1929, the year following 1929 and the year in which these Orders were made.

In the report for 1929, which includes the period from December 1, 1928, to November 30, 1929, in which these Orders were made, it is noted, on page 2329, that there had been withdrawn, prior to December 1, 1928, 5,494,042 acres of petroleum lands but that there were no withdrawals from December 1, 1928, to November 30, 1929, and that the then outstanding number of acres withdrawn were 5,494,042, which was the same number as at the beginning of that period. In the Annual Report of the Commissioner of the General Land Office for the fiscal year ending June 30, 1929, page 16, is the following:

> "WITHDRAWALS AND RESTORATIONS * * * OIL. 92,140 acres heretofore withdrawn as potentially valuable for petroleum were restored to entry during the year. *No withdrawals were made.*"

It is therefore noted that while there were 92,140 acres restored to the public domain during this period no withdrawals were made. Section 3 of the Act of June 25, 1910, is as follows:

> "The Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals."

Section 1 of the Act provides as follows:

> "The President may at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water power sites, irrigation, classification of lands, or other public purposes to be specified in the Orders of Withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress."

The purpose of the reports required in Section 3 is apparent when that section is considered in connection with Section 1. Congress under the Constitution is charged with the duty of disposal of the public lands. It has given authority to make *temporary* withdrawals provided reports are made to Congress at the beginning of the next regular session. This is done so that Congress may revoke such Orders of Withdrawal. As the Secretary of the Interior did not consider his refusal to accept prospecting permits

after March 16, 1929, as a withdrawal of the public lands covered by the applications for permits, he did not include them in his report to Congress on December 10, 1929. The Act of June 25, 1910, provides that the Orders of Withdrawals shall specify the purposes for which the withdrawals were made. Since no Orders of Withdrawals were made, the Secretary of the Interior did not report any withdrawals to Congress.

The District Court of Appeals held that the Act of June 25, 1910, was in full force and effect and was not repealed by the Leasing Act of February 25, 1920.

The Court of Appeals of the District of Columbia, after discussing the proposition of withdrawal under the Act of June 25, 1910, says that there might be an implied power under the Act of February 25, 1920, for such a withdrawal. The answer to that is that the act contains no such authority and it cannot be assumed that there is such an implied power in that act. Congress alone, under the Constitution, has jurisdiction over the Public Lands, and passed the act of June 25, 1910, providing how the public lands may be withdrawn. That Act is exclusive.

If the terms of the act of June 25, 1910, have not been complied with then there is no withdrawal under any law.

As a ground for the granting of writ of certiorari, as set out in Rule 38, paragraph 5 (c) of the Rules of this court, the State of Colorado says, that the Court of Appeals has decided a question of general importance relating to the construction of the Leasing Act of February 25, 1920, which has not been, but should be. settled by this court.

CONCLUSION.

The question of whether there was a withdrawal of the public lands from the filing of applications for prospecting permits under the Leasing Act; whether the Act itself is mandatory or permissive and whether the Secretary has power to suspend the Act, are discussed at length in Petitioner's brief and in briefs amici curiae filed on behalf of other of the public land states affected by the Secretary's action.

Having thus set forth the interest of the State of Colorado in this litigation, this Honorable Court is urged to grant Petitioner's application for writ of certiorari; to reverse the decision of the Court of Appeals of the District of Columbia and direct that a writ of mandamus issue to compel the Respondent to receive and file the application for prospecting permit under the Act of February 25, 1920.

Respectfully submitted,

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